**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **HENRY D. HAGGARD** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **BRANSON TRUCK LINE, INC. and** | ) | |
| **DENNIS SHELDON d/b/a** | ) | |
| **SHELDON TRUCKING** | ) | |
| Respondents | ) | Docket No. 244,540 |
| | ) | |
| AND | ) | |
| | ) | |
| **CONTINENTAL WESTERN INS. CO.** | ) | |
| **and COMMERCIAL UNION INS. CO.** | ) | |
| Insurance Carriers | ) | |

## ORDER

Claimant and respondent Branson Truck Line, Inc., (Branson) and its insurance carrier requested review of the October 23, 2006, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on January 9, 2007.

### APPEARANCES

John J. Bryan, of Topeka, Kansas, appeared for the claimant. James B. Biggs, of Topeka, Kansas, appeared for respondent Branson and its insurance carrier. Gary R. Terrill, of Overland Park, Kansas, appeared for respondent Dennis Sheldon d/b/a Sheldon Trucking (Sheldon) and its insurance carrier.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The Board has also considered the transcripts of the August 24, 1999, preliminary hearing and the deposition of the claimant taken on October 5, 2006, both of which are a part of the record but which were not listed as such in the ALJ's Award.

## ISSUES

The ALJ found that claimant was an employee of respondent Branson. The ALJ noted that four doctors entered opinions on claimant's functional impairment. The ALJ found all ratings equally credible and found claimant had an 18.25 percent functional impairment to the body as a whole, which the ALJ said was an average of the four ratings. The ALJ concluded that claimant did not make a good faith effort to find appropriate employment and imputed a wage of $333.33 per week, making claimant's wage loss 14 percent. The ALJ found that three doctors gave task loss opinions. He purportedly gave equal deference to all three assessments and found that claimant's task loss was 38 percent. Averaging the wage loss with the task loss, the ALJ found that claimant had a work disability of 26 percent. The ALJ also concluded that respondents would not be entitled to a set-off for Social Security benefits or for retirement benefits being received by claimant.

Claimant argues that he is permanently and totally disabled. If the Board finds claimant is not permanently and totally disabled, claimant requests a work disability of 82 percent. Claimant requests review of the ALJ's finding that he should have a wage imputed to him and argues that he has a 100 percent wage loss because he has not been employed in the open labor market since his injury. Claimant also contends that the ALJ made a mathematical error in computing his task loss and asserts that giving equal weight to all three doctors who had given a task loss opinion would compute to a 48 percent task loss instead of a 38 percent task loss. Claimant further argues that the task loss opinion of Dr. Sergio Delgado is not credible and that his task loss should be 64 percent as found by Drs. Peter Bieri and Daniel Zimmerman. Claimant also argues that he should be awarded future medical treatment with Dr. Glenn Kubina to provide him with hearing aids, the repair of those hearing aids, and the replacement of hearing aids and batteries.

Respondent Branson argues that claimant should be limited to his functional disability, arguing that claimant has shown he has the ability to return to work at a comparable wage and that no physician has placed restrictions on him that would prohibit him from working a 40-hour work week. Respondent Branson also argues that no employee/employer relationship existed between it and claimant on the date of the accident, claiming that claimant was an employee of Sheldon on that date.

Respondent Sheldon argues that the ALJ has previously found that an employer/employee relationship existed between respondent Branson and claimant on the date of the accident, and this finding was affirmed by the Board in its preliminary hearing order of November 22, 1999. Respondent Sheldon contends the law and facts have remained the same since those orders and, therefore, the ALJ's finding that there was an employer/employee relationship between claimant and respondent Branson on the date of the accident should be affirmed.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the award entered against respondent Branson and its insurance carrier should be reversed and, instead, an award should be entered against respondent Sheldon and its insurance carrier based upon a 55.5 percent work disability.

Claimant was 65 years old on the date of the accident, March 18, 1999. He had retired from Conoco in 1996 and had been hired by Branson to work as a part-time driver two or three weeks before the date of accident. On the date of the accident, claimant was driving a tractor owned by Sheldon pulling a trailer owned by Branson. Claimant picked up a load of cattle and drove them to IBP in Emporia, Kansas. In the process of unloading the cattle, a cow kicked a gate, and the gate hit claimant in the head. Claimant suffered a closed head injury and a basilar skull fracture. He was unconscious for several days and was in the hospital for several weeks.

Claimant was hired by Branson as an extra driver to drive when they needed him. He met with Dennis Suhler, president of Branson, who told him to get a physical. Claimant stated that he was to be paid a percentage of each load but could not remember what percentage was agreed upon.

Claimant was asked to drive a truck owned by respondent Sheldon. Claimant agreed and test drove the truck with Dennis Sheldon. It was claimant's understanding that Mr. Sheldon would be out of town for several weeks and that was why he was going to be driving Mr. Sheldon's truck. Mr. Sheldon told claimant where to get a tire fixed if he had a flat and where to take the truck if he needed maintenance done on it. Claimant did not know what arrangement Mr. Sheldon had with respondent Branson.

Claimant continues to have problems since his accident. He has a balance problem and gets dizzy if he bends over or looks up. He suffers from short-term memory loss. He becomes disoriented and gets lost driving after dark. He has no initiative and no confidence in himself. He lost hearing in his right ear and cannot hear well, even with hearing aids in both ears. He had no sense of smell or taste after the accident and those senses are still diminished. He has daily headaches for which he takes aspirin, Ascriptin or Tylenol. He has no stamina and tires easily, requiring him to take breaks to rest.

Claimant requests future medical, and specifically requests that Dr. Kubina be named an authorized treating physician. Claimant was last seen in Dr. Kubina's office on August 30, 2006, at which time it was recommended that he be seen for a current hearing test and a hearing aid evaluation. Claimant received hearing aids in both his right and left ears after the accident which were supplied through workers compensation. Claimant has worn the hearing aids continuously since that time, and they have been repaired twice. Repairs were paid for through workers compensation. Claimant said the hearing aid in his

left ear has now quit working, and the hearing aid in his right ear is weakening. Claimant testified that it was recommended that he receive two new hearing aids. The ALJ did not address this request in the Award.

Testimony from claimant's daughter, Penny Roelfs, and wife, Barbara Haggard, corroborated claimant's assertions that he has changed since the accident, that claimant now gets disoriented and dizzy, has a balance problem, has had a loss of hearing, and has loss of memory. Ms. Roelfs testified that she did not think it would be safe for claimant to drive a semi. Ms. Haggard testified that claimant does not like to be alone and that she has to go with him wherever he goes.

Claimant admits that he has not looked for work since the accident. He runs errands for his son, who works in the construction industry, but he does not get paid. He stated that sometime after the accident, he co-drove a semi to Montana five or six times with Tim Roelfs, his daughter's father-in-law. Claimant testified that he drove during both daylight and nighttime hours and thought he drove from 30 to 50 percent of the time. Claimant was only paid enough to cover his expenses and said he agreed to team drive with Mr. Roelfs to see if he could drive again. After five or six times, claimant decided he did not want to continue. He thought he did pretty well driving with another driver who could take over when he got tired but said he never would have tried driving by himself.

Claimant also testified that he drove a minivan making deliveries for a period of five to six weeks. He said he drove no more than 30 miles from home, mostly during daylight hours. He was not required to do any heavy lifting. He testified he only agreed to drive this minivan to help out a friend who was having heart surgery. He said he was paid $2,000 for the work he performed in the five- to six-week period.

Dennis Suhler is the president/owner of respondent Branson. He testified that claimant came to work for Branson as a part time employee to cover when the regular drivers were on vacation or when Branson needed extra drivers. Mr. Sheldon is not an employee of Branson but is a lease operator, leased to Branson. A lease driver owns his own truck and may or may not pull a company trailer driving his own truck. Branson company drivers are paid from 22 to 25 percent of the load, whereas Mr. Sheldon gets 75 percent of the load because he owns his own truck. Mr. Sheldon provides his own gas and maintenance. The lease agreement Branson has with Mr. Sheldon states that Branson will provide cargo and liability insurance and Mr. Sheldon will provide the driver and workers compensation insurance.

When claimant drove as a fill-in driver for Branson, he was considered an employee. Branson withheld taxes from his pay and provided him a truck. Branson paid for the upkeep of the truck and paid for gas. Claimant was reimbursed for out-of-pocket expenses. On the day claimant was injured, however, he was driving a lease truck owned by Sheldon, not a Branson truck, but was pulling a Branson trailer. Accordingly, claimant was working for Sheldon, not Branson, on the date of the accident. Sheldon was

responsible for the gas and maintenance of the truck and for paying the driver, claimant, out of Sheldon's share of the load.

Mr. Suhler testified that Mr. Sheldon had come to him and said he would be gone to Colorado for a couple of weeks taking care of his recently deceased father's estate. Mr. Sheldon asked if he could use claimant to drive his truck, and Mr. Suhler told him that he could use claimant but would have to pay him and provide workers compensation. Mr. Suhler did not know what percentage Mr. Sheldon arranged to pay claimant. Mr. Suhler's only involvement with claimant driving Mr. Sheldon's truck was to tell him where to pick up the load and where to take it.

Mr. Suhler said that because of a clerical mistake made by someone in Branson's office, claimant was paid directly by Branson for driving the lease truck the day he was injured. The Branson bookkeeper apparently paid claimant because claimant was in the hospital and his wife was making trips to the hospital. However, Mr. Suhler told the person who sent the check in error that the payment would need to be reimbursed by claimant, and then claimant should go to Mr. Sheldon for payment out of Mr. Sheldon's 75 percent. Mr. Suhler assumed that when the check was issued to claimant, federal and state income taxes would have been deducted.

Mr. Sheldon testified he leases his tractor to Branson and Branson hooks up its trailer to the leased tractor. Mr. Sheldon or his driver then takes the tractor/trailer to wherever instructed by Branson. When a load is taken in Mr. Sheldon's truck, he gets 75 percent of the gross profit. Out of that, he pays for his fuel, any mechanical work done, and wages to any employee driving the truck.

Mr. Sheldon testified that Branson had hired claimant as a part-time driver, and Mr. Suhler asked Mr. Sheldon if he would like to use claimant while he was out of town. Mr. Sheldon agreed. Mr. Sheldon said he had no responsibility of telling claimant how to complete delivery of a load, but he did tell claimant where to get tires fixed if he had a flat and where to get maintenance on the tractor if needed.

Mr. Sheldon said that although claimant received a paycheck from Branson for the date of the accident, actually Sheldon paid claimant because the money was withheld from Sheldon's settlement sheet, *i.e.*, the 75 percent Sheldon was paid by Branson. Claimant was paid directly by Branson because it was quicker than having to wait for Mr. Sheldon to return from Colorado.

Sheldon had workers compensation on claimant at the time of the injury. Mr. Sheldon called his insurance agent before he left for Colorado and put claimant on his coverage. He did this because claimant was going to be his employee while he was in Colorado, and under his lease agreement with Branson, he was to provide workers compensation insurance when a driver other than himself was driving the truck. It is Mr. Sheldon's understanding that claimant was driving for him as his employee on the date he

was injured. Mr. Sheldon testified that he and claimant had agreed that claimant would get 25 percent of the load as payment when claimant was driving the truck. Mr. Sheldon provided the fuel.

Dr. Blake Veenis is board certified in physical medicine and rehabilitation. He first saw claimant as a patient on March 25, 1999, a week after the accident. Claimant had been admitted to Wesley Rehabilitation Hospital at that time with a traumatic brain injury. Claimant was released from the rehabilitation hospital on April 16, 1999, and Dr. Veenis saw him for follow-up beginning May 19, 1999.

At the May 19, 1999, office visit, claimant was complaining of hearing loss and short-term memory loss. He denied any problems with headaches, light-headedness, dizziness, seizures, or speech problems. Dr. Veenis also stated that claimant was suffering from mood issues. Dr. Veenis recommended claimant see Dr. Glenn Kubina for his hearing loss problems and also have some neuropsychological testing.

When Dr. Veenis next saw claimant on June 30, 1999, claimant indicated to Dr. Veenis that he thought his short-term memory was improving and was almost back to pre-accident level. Claimant complained of daily neck pain that was similar to neck pain he had before the accident but which was occurring more frequently.

Dr. Veenis released claimant to part-time light duty work as of September 7, 1999, with restrictions of no lifting greater than 10 pounds frequently and 10 pounds occasionally. Dr. Veenis also said that claimant should not work around cattle because of a risk of contact and reinjury. He did find that claimant could return to driving, including driving of semi tractor trailers.

By April 11, 2000, claimant told Dr. Veenis that he had test-driven an 18-wheeler and felt like he could do it. Dr. Veenis felt at that time that claimant had reached a plateau in his brain injury recovery. He continued claimant's restrictions given in September 1999. Dr. Veenis found claimant to be at maximum medical improvement on May 8, 2000. At that time, he imposed permanent restrictions on claimant of no working at unprotected heights and no loading or unloading of cattle. He also stated that claimant should be allowed to take rest breaks as needed to prevent physical and cognitive fatigue.

Dr. Veenis rated claimant using the AMA *Guides*[1], finding he had a 6 percent permanent partial impairment to the whole person for his traumatic brain injury and residual memory problems, problem solving deficits, and attention deficits. Dr. Veenis found claimant had an additional 4 percent permanent partial impairment to the body as a whole for claimant's balance problems. Dr. Veenis rated claimant as having a 4 percent

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

permanent partial impairment to the body as a whole for his hearing loss in his right ear, of which he found 2 percent to be related to claimant's injury. Using the Combined Values Chart, Dr. Veenis found claimant had a 12 percent permanent partial impairment to the body as a whole. Dr. Veenis diagnosed claimant with an adjustment disorder and admits that he did not rate that impairment in May 2000. He testified he would give claimant a 4 percent rating for that impairment, which would increase claimant's permanent partial impairment from 12 percent to 16 percent.

Dr. Veenis continued to follow up with claimant. On August 14, 2001, claimant complained of continuing mild dizziness with quick turning when walking. He still complained of decreased taste and smell and problems with reading comprehension. Dr. Veenis saw claimant again on March 4, 2002, and saw him last on March 11, 2003. He opined that claimant could need future medication and counseling for depression. He also recommended that claimant continue to use two hearing aids.

Dr. Veenis testified that claimant would be able to engage in over-the-road truck driving as a team driver. He also felt that claimant was capable of engaging in a job of a delivery person driving a van, as long as claimant was able to stay within his restrictions. He would not want claimant working at an unprotected height of over about three feet, with three to six feet being in a gray area, which could prevent him from checking the oil or working under the hood of a semi.

Dr. Daniel Zimmerman, a board certified independent medical examiner, examined claimant on June 21, 2002, at the request of claimant's attorney. Dr. Zimmerman reviewed claimant's past medical records from the accident and took a history from claimant. Dr. Zimmerman noted that claimant's discharge diagnosis from the hospital was a closed head injury and a basilar skull fracture. Dr. Veenis' records indicated that as a result of his injuries, claimant sustained cognitive deficits, a balance disorder, impulsivity, hearing loss in the right ear, and occasional headaches.

In examining claimant, Dr. Zimmerman found claimant had intraspinous tenderness from C4 through C7 and tenderness on palpation of the cervical paraspinous musculature on the right side. Claimant had severe pain on palpation over the greater occipital nerve on the right side. Claimant was able to heel and toe walk satisfactorily but could not maintain his balance in tandem walking. In doing a Romberg test, claimant swayed from side to side but did not actually lose his balance. Dr. Zimmerman found that claimant has a severe deficit in his ability to smell noxious odors, and his taste sensation is compromised but improved.

Using the AMA *Guides*, Dr. Zimmerman rated claimant as having a 10 percent permanent partial impairment of the body for residuals of his head injury including mild cognitive deficit and emotional and behavioral deficits. He also gave claimant an 11 percent permanent partial impairment to the body as a whole for aggravation of osteoarthritis affecting the cervical spine with a greater occipital nerve entrapment

syndrome. Dr. Zimmerman rated claimant as having a 3 percent permanent partial impairment for his lack of smell and a 5 percent permanent partial impairment for hearing loss in the right ear. Using the Combined Values Chart, Dr. Zimmerman rated claimant as having a total of 25 percent permanent partial impairment to the body as a whole.

Dr. Zimmerman felt that claimant was capable of lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis. Claimant should avoid hyperextension and hyperflexion of the cervical spine or holding the cervical spine in captive positions for extended periods of time. He should avoid work activity at heights or around dangerous machinery and work which would require him to load or unload cattle. Dr. Zimmerman agreed with Dr. Veenis that claimant should have rest breaks to prevent physical and cognitive fatigue. He would not recommend claimant for a job driving a semi over the road. Dr. Zimmerman believed that claimant was able to work within the restrictions set out in his report.

Dr. Zimmerman admitted that he did not say in his report that claimant could not operate a truck but did say that claimant should not work around dangerous machinery, and he felt a truck was a dangerous machine. Also, he felt that claimant's restriction that he be able to take rest breaks would have an impact on his ability to drive a truck in a commercial sense.

Dr. Zimmerman reviewed a task list prepared by Bud Langston and opined that of the 11 tasks on the list, claimant was unable to perform 7 for a task loss of 64 percent.

Dr. Sergio Delgado, a board certified orthopedic surgeon, examined claimant on November 12, 2002, pursuant to an order of the ALJ. Dr. Delgado was asked to provide an opinion regarding claimant's disability, need for future medical treatment, restrictions for work activities, apportionment of any preexisting impairment, and task loss.

Claimant related to Dr. Delgado that he had unsteadiness in his gait, loss of confidence, depression, intermittent headaches, short-term memory problems, difficulty sleeping, loss of hearing in his right ear, neck pain with neck motion, and taste and smell deficits. Claimant made no complaints related to the neck, upper extremities, back, or lower extremities. Dr. Delgado could not reproduce claimant's headaches by putting pressure in the occipital region. Dr. Delgado did not test claimant's claim of loss of his sense of smell, but claimant told him that his smelling ability had improved. Dr. Delgado did not conduct a psychological evaluation, nor did he perform any testing to determine cognitive impairment. Dr. Delgado agreed claimant had short-term memory loss and said it would be partially caused by the accident, partly from old age. Dr. Delgado's examination was limited to the orthopedic examination of claimant's neck; the rest was observation and a review of claimant's medical records.

Dr. Delgado opined that claimant had mild emotional and behavioral disturbances but retained the ability to satisfactorily perform most activities of daily living. Dr. Delgado

assigned a 2 percent whole person impairment for this category. Dr. Delgado also assigned a 2 percent whole person impairment because claimant had a mild limitation of daily social and interpersonal function. Dr. Delgado assigned an additional 2 percent for brief repetitive or persistent alteration of state of consciousness, which limited claimant's ability to perform his usual activities. Dr. Delgado also found claimant had a 4 percent whole person impairment for loss of hearing. These combined for a 10 percent permanent partial impairment to the body as a whole.

Dr. Delgado did not find that claimant had an impairment for an occipital nerve injury. He also did not find that claimant's incomplete loss of taste and smell affected his daily living and opined that claimant did not qualify for an impairment rating for those loss of functions.

Dr. Delgado followed criteria from Dr. Veenis to determine claimant's ability to do work. He reviewed the task list prepared by Mr. Langston and opined that claimant was unable to perform 2 of the 11 tasks for a task loss of 18 percent.

Dr. Peter Bieri, a specialist in otolaryngology (ENT) and a member of the American Academy of Disability Evaluating Physicians, examined claimant on October 31, 2005, at the request of claimant's attorney. He found that claimant's mood and affect were somewhat flat. Claimant's gait, station and posture were unremarkable, but it was difficult for him to get on and off the examining table. Dr. Bieri found that claimant demonstrated gross neurologic deficit in his ability to stand with his eyes closed. Romberg testing was grossly abnormal. Claimant became dizzy when extending his neck and looking upward. Dr. Bieri found that claimant had hearing loss, worse in the right ear. He tested claimant for taste and smell. Claimant had some element of taste but was not able to identify coffee and cinnamon. Claimant's gross cerebellar function was slightly impaired, and his ability to perform repetitive fine and gross motor movements in both upper extremities was slightly to moderately impaired. Claimant had difficulty walking on heels and toes.

Based on the AMA *Guides*, Dr. Bieri found that claimant had a 9 percent whole person impairment for his loss of hearing, a 10 percent whole person impairment for cognitive and mental status impairments, a 10 percent whole person impairment for vestibular dysfunction, which combined for a 26 percent permanent partial impairment to the body as a whole.

Dr. Bieri concluded that claimant met the general physical demand level of light-medium, and should limit occasional lifting to 40 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds of constant lifting. He also restricted claimant from working with cattle and working at unprotected heights. Dr. Bieri reviewed Mr. Langston's task list and opined that claimant was unable to perform 7 of the 11 tasks for a task loss of 64 percent. Dr. Bieri stated that claimant should not return to work driving a semi, even though he had team-driven a truck for a time since the accident.

Dr. Bieri stated that claimant would need hearing aids for the rest of his life and that most hearing aids need to be replaced every year and a half to two years for optimum function.

Bud Langston, a rehabilitation counselor, met with claimant on January 10, 2002, at the request of claimant's attorney. Mr. Langston prepared a list of 11 tasks claimant performed in the 15 years before the accident.

Mr. Langston opined that because of claimant's restrictions, education, training, experience, age, and capacity for rehabilitation, he was permanently and totally disabled from engaging in any substantial gainful activity.

Mr. Langston stated that when he saw claimant, claimant still had his commercial driver's license. However, because of his restriction to take rest breaks, claimant would be unable to go back to driving an over-the-road truck. Mr. Langston did not attempt any job placement for claimant. They did not discuss claimant's job search. Although claimant had driven a semi with another driver since the accident, Mr. Langston testified that did not exhibit an ability to hold down a job.

Michael Dreiling, a vocational rehabilitation consultant, met with claimant on October 29, 2002, at the request of respondent Branson. Claimant told Mr. Dreiling that he had made four or five trips to Montana and Wyoming hauling cattle with another driver. Claimant indicated he was not involved with loading or unloading cattle but was only involved with the driving aspect along with a co-driver. Claimant said that after four or five trips, he did not feel comfortable with driving and discontinued that work. Claimant had not worked since then, and Mr. Dreiling did not think claimant was actively looking for a job when he interviewed him. Mr. Dreiling did not see anything in claimant's physical restrictions that would prevent him from seeking gainful employment. He believed theoretically that claimant is capable of engaging in gainful employment in the open labor market. However, when factoring in claimant's age, there would be issues limiting his employability.

Mr. Dreiling said that a scenario where claimant was co-driving with a friend or relative who was giving him the opportunity to drive to see if he could handle it would not constitute being employed in the open labor market. He also testified that a scenario where claimant drove a delivery van for a friend for four to six weeks and did not receive a regular paycheck but was given $2,000 by the friend would not be considered as being part of the open labor market.

Mr. Dreiling opined that if claimant were to obtain a job driving locally, he would be able to earn $10 per hour or $400 per week. He admitted he did not do a labor market survey in this case and did not investigate jobs that might be available in claimant's home town for a person with claimant's qualifications. He stated that claimant's only transferrable job skill is truck driving, and claimant's capacity for employment outside the transportation

industry is very limited. A retraining program would not be cost-effective because of claimant's age.

Following the August 24, 1999, preliminary hearing, the ALJ found claimant was an employee of respondent Branson.[2] That finding was affirmed by the Board in an Order dated November 22, 1999, based on the right to control test.[3] The ALJ followed those earlier findings in his Award. Counsel for respondent Sheldon argues that

> the facts and law on this issue remain precisely the same as they were at the time that the Board previously addressed the issue. . . .
>
> . . . Accordingly, [respondent Branson] can point to no significant change in the law which would merit a change in its previous decision on this issue by the Board.[4]

However, as counsel know, preliminary hearing findings and conclusions are neither final nor binding, as they may be modified upon a full hearing of the claim.[5] Furthermore, the appeal from the ALJ's preliminary hearing order was decided by a single Board Member as is permitted by K.S.A. 44-551(b)(2)(a), whereas an appeal from a final award is decided by all five Board Members.[6] After a review of the entire record, the Board concludes that claimant was an employee of Sheldon, who was a subcontractor of Branson, the principal. As claimant was an employee of a subcontractor (Sheldon) who was required to and did, in fact, obtain workers compensation insurance to cover claimant, "the principal [Branson] shall not be liable for any compensation under . . . the workers compensation act . . . ."[7] Therefore, respondent Sheldon and its insurance carrier shall be responsible for all benefits awarded claimant for this work-related injury.

Claimant's traumatic brain injury and the impairments resulting from the same were evaluated by four physicians who testified. Their total combined ratings were as follows: Dr. Bieri, 26 percent; Dr. Zimmerman, 25 percent; Dr. Veenis, 16 percent (not the 12 percent found by the ALJ); and Dr. Delgado, 10 percent. The ALJ averaged the total impairment rating opinions of all four physicians and arrived at an 18.25 percent

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[2] ALJ Order (Aug. 31, 1999).

[3] *Haggard v. Branson Truck Line, Inc. and Dennis Sheldon d/b/a Sheldon Trucking*, No. 244,540, 1999 WL 1113618 (Kan. WCAB Nov. 22, 1999).

[4] Respondent Sheldon and its insurance carrier's Brief to the Board, filed Dec. 28, 2006, at 1-2.

[5] K.S.A. 44-534a.

[6] K.S.A. 44-555c(k).

[7] K.S.A. 44-503(g).

impairment. The correct mathematical calculation is 19.25 percent. However, the Board does not think a straight average of all opinions is the best way to find claimant's permanent functional impairment. First, Dr. Delgado's opinions are not credible. He did an uncharacteristically inadequate job of evaluating and rating the claimant. Second, not every physician diagnosed and rated the same conditions. Therefore, the Board will use the ratings given by Drs. Bieri, Zimmerman, and Veenis for each separate condition and then combine those to arrive at a total percentage of claimant's permanent impairment of function.

Claimant's hearing loss was assessed by Dr. Bieri to be 9 percent, by Dr. Zimmerman at 5 percent, and by Dr. Veenis as 4 percent, although he only related 2 percent to the accident, plus 4 percent for loss of balance. Of these three physicians, Dr. Bieri, having specialized training as an ENT physician, is the most qualified to diagnose and rate for this area. Accordingly, the Board adopts Dr. Bieri's 9 percent.

Dr. Bieri was the only physician who rated vestibular dysfunction as a separate item. The Board also adopts Dr. Bieri's ratings and rationale for a 10 percent vestibular dysfunction.

Claimant's cognitive deficit and his emotional and behavioral disorder were rated at 10 percent by Drs. Zimmerman and Bieri and 6 percent by Dr. Veenis. The Board finds claimant's impairment is 10 percent for these conditions.

In addition, the Board adopts Dr. Zimmerman's 3 percent impairment due to the loss of smell and taste and 11 percent impairment for the aggravation of preexisting degenerative condition in claimant's neck and loss of range of motion of the neck.

Using the combined value tables of the AMA *Guides*, the total of these ratings (9 + 10 + 10 + 3 + 11) amounts to a whole person impairment of 36 percent.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based upon all the evidence, including expert testimony, concerning the capacity to earn wages.[8]

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[8] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

The Board finds claimant is capable of engaging in substantial gainful employment but failed to make a good faith job search after he reached maximum medical improvement and was released with permanent work restrictions. Accordingly, a post-injury wage will be imputed to claimant. The Board disagrees with the ALJ's conclusion that claimant is capable of earning approximately $333.33 per week and, therefore, has a wage loss of only 14 percent. That wage was premised upon a conclusion that claimant is capable of working as an over-the-road truck driver or delivery driver, a conclusion the Board does not share. Claimant's problems with balance, dizziness, cognitive deficits, fatigue, range of motion of his head and neck, and his adjustment disorder, which affect his behavior and emotional/social functioning, all combine to preclude him from returning to his former occupation, even in an accommodated position. Furthermore, there has been no showing that any such accommodated work would even exist and be available in claimant's geographic area. The Board agrees with the restrictions imposed by Drs. Zimmerman and Bieri. It would not be safe for claimant or for other travelers on the highways for claimant to be operating a large truck.

The $400 per week post-accident wage earning ability opinion of Mr. Dreiling is not credible, as it was premised upon claimant working as a truck driver. Realistically, claimant is only capable of performing unskilled light duty or sedentary work at an entry level position. Accordingly, the Board will impute the federal minimum wage of $5.15 per hour or $206 per week based upon a 40-hour week working. This is the best measure of claimant's wage earning ability. This results in a wage loss of 47 percent. Averaging this with the 64 percent task loss opinions given by Drs. Zimmerman and Bieri results in a 55.5 percent work disability.

Respondent Sheldon and its insurance carrier shall reimburse respondent Branson and its insurance carrier for the cost of the preliminary medical and temporary total disability benefits it paid to or on behalf of claimant. Finally, respondent Sheldon and its insurance carrier are ordered to provide claimant with appropriate ongoing medical treatment, including hearing aids, and to reimburse claimant for his out-of-pocket expenses in connection with obtaining reasonable and related medical treatment, including hearing aids and supplies.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 23, 2006, is reversed and an award is entered against respondent Dennis Sheldon d/b/a Sheldon Trucking and its insurance carrier, Commercial Union Insurance Company, based on a 55.5 percent work disability.

Claimant is entitled to 59.43 weeks of temporary total disability compensation at the rate of $258.22 per week or $15,346.01, followed by 205.67 weeks of permanent partial disability compensation at the rate of $258.22 per week or $53,108.11, for a 55.5 percent work disability, making a total award of $68,454.12.

As of January 25, 2006, there would be due and owing to the claimant 59.43 weeks of temporary total disability compensation at the rate of $258.22 per week in the sum of $15,346.01 plus 205.67 weeks of permanent partial disability compensation at the rate of $258.22 per week in the sum of $53,108.11, for a total due and owing of $68,454.12, which is ordered paid in one lump sum less amounts previously paid.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. Even though claimant's attorney's letter to the Director dated January 17, 2001, indicates a copy of the attorney fee contract was enclosed, the record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

**IT IS SO ORDERED.**

Dated this _____ day of January, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
James B Biggs, Attorney for Respondent Branson and its Insurance Carrier
Gary R. Terrill, Attorney for Respondent Sheldon and its Insurance Carrier
Brad E. Avery, Administrative Law Judge